SUPREME COURT, U. S.

No. 73-1008

Supreme Court, U
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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM 1973

PORTLAND CEMENT ASSOCIATION,

Petitioner,

vs.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

MEDUSA CORPORATION
NORTHWESTERN STATES PORTLAND CEMENT CO.,

Intervenors.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

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The Agency asserts the Writ should not issue because a requirement that EPA prepare impact statements would be inconsistent with provisions of the Clean Air Act; that several federal appeals courts have so held; and that, since the record was remanded for limited supplementation, the Standards should not be set aside.

These contentions are unsupportable.

Adequacy of the Record

The administrative record was found to be totally inadequate to support judicial review. (Pet. App. 53) The remand was *not* solely for "clarification of certain matters concerning methodology of tests" as asserted by respondent. (R. Opp. Br. p. 3) The record failed to contain adequate information on *any* of the matters necessary to sustain the Standards.

The court found a "critical defect" in the Agency's determination that the Standards are achievable. (Pet. App. 31ff) It also found that opacity measurements may be "inherently inadequate" and that the Agency failed to show that the 10% opacity measurement required by the Standard can be made within reasonable accuracy. (Pet. App. 51, 52) In addition the Agency was directed to respond to questions concerning adverse environmental impacts (Pet. App. 21), economic costs (Pet. App. 24), future supply of cement (Pet. App. 24), and cost-benefit analysis (Pet. App. 23). In fact the court did not find a single necessary element adequately covered in the administrative record.

A regulation purportedly based on such a completely inadequate administrative record should be set aside. *Camp* v. *Pitts,* 411 U.S. 138 (1973).

Environmental Impact Statements

The Agency's opposition brief argues that preparation of environmental impact statements by EPA would be "duplicative and inconsistent with the detailed provisions and time schedule of Section 111 of the Clean Air Act." (R. Opp. Br. p. 4)

This is shocking!

EPA has announced *to the public* that it has decided to COMPLY WITH THE SPIRIT OF NEPA AND WILL PREPARE IMPACT STATEMENTS IN CONNECTION WITH ITS MAJOR REGULATIONS.[1] This announcement reveals that the Agency has, throughout this litigation, represented to the courts (including this Court) that compliance with NEPA is inadvisable, if not impracticable —and *at the same time* its staff has concluded that a directly opposite policy can, and should be followed. The following chronology was revealed by EPA's announcement on April 26, 1974.

The cement Standards were based "almost exclusively on technology." Under Agency policy the degree of required control was considered adequately demonstrated if a single test for a short period on the most stringently controlled facility showed compliance. No consideration was given to whether the specified degree of control was required to protect the public health or welfare. Cost of the prescribed degree of control was taken into consideration only to the extent that the Agency concluded that the cost burden was "feasible." The cost was *not* balanced against expected environmental benefits as would be required in a NEPA environmental impact statement.[2]

In April 1972 an EPA task force was established to determine whether EPA should prepare environmental impact statements for its regulatory programs.[3]

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[1] 1974 B.N.A. Env. Rptr., Curr. Devel. 2128-29 (April 26, 1974) (Ex. A hereto).

[2] *Application of the National Environmental Protection Act to EPA's Environmental Regulatory Activities,* Task Force Report, EPA, 1973 (relevant excerpts attached as Ex. B) pp. 12, 13, 56-58.

[3] *Id,* p. 2.

On November 30, 1972 the Agency argued to the court below that "Requiring the Agency to follow NEPA procedures in connection with this rulemaking would, in effect, subvert the specific requirements of the Clean Air Act." (R. Br. p. 40) This contention was reiterated in oral argument in January 1973.

In February 1973 the task force report was published internally. It concluded that the promulgated Standards "may not meet the criteria of [NEPA]," that compliance with NEPA would produce benefits but might create delay and would require additional manpower.[4]

On June 29, 1973 the court below, *not* having been advised of this report, and principally because of the asserted difficulties attributable to NEPA compliance, undertook judicial legislation and "created" an exemption from the unmistakably explicit provisions of NEPA for EPA determinations under Section 111 of the Clean Air Act. (Pet. App. 6-21)

Meanwhile, on June 14, the Agency announced that in proposing regulations it would make available information concerning "major environmental effects" and "a discussion of pertinent non-environmental factors" including "social, and economic factors." (38 Fed. Reg. 15653)

The petition for rehearing called this to the court's attention a month later with the observation that the substance of the contemplated information constituted an environmental impact statement. The Agency responded to the court stating:

> "Suffice it to say that the information to be distributed by the Administrator to interested persons is most certainly not 'an environmental impact state-

[4] *Id,* pp. 56-58.

> ment as required by NEPA.' Nor is it intended to be. The Administrator, as evidenced by his position in this case, is in total agreement with the determination set forth in the Court's opinion that a NEPA impact statement is not required in promulgating new source standards under Section 111.'"[5]

Thus reassured, the court denied the petition for rehearing.

Now, the Agency has concluded that preparation of impact statements will *not* "subvert the specific requirements of the Clean Air Act" and proposes to prepare such statements, thus "providing for greater public involvement, and providing better analysis of EPA's activities."[6] But this procedure will not apply retroactively. The result is that the unfortunate decision will remain standing as a confusing legal precedent and some stationary source standards will have a different basis than others—the quintessence of arbitrariness and discrimination.

Review by this Court is urgently needed to rectify the results of the sequence described above. The decision below is *the* basic statement of the erroneous legal principles. It concerns the first case for direct judicial review of stationary source standards by the one court which has exclusive jurisdiction under the statute.

The other decisions cited in the Agency's opposition brief are not pertinent. Those opinions involved collateral attack (*Getty*), state implementation plans where state proceedings presumably furnish adequate safeguards (*Appalachian Power Co., Duquesne Light Co., Buckeye Power,*

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[5] Resp. Reply, p. 8 (copy attached as Ex. C).

[6] Note 1, *supra.*

Inc.), a completely different statute concerning insecticides (*Environmental Defense Fund, Inc.*), pure dictum (*Anaconda Company*), and one contains the statement "although we do not reach the question whether EPA is automatically and completely exempt from NEPA . . ." (*International Harvester Co.*).

CONCLUSION

In order to correct the erroneous decision below which was based on misapprehension, and for the other reasons stated herein and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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EXHIBIT A

(From 1974 B.N.A. Env. Rptr., Curr. Devel. 2128-29)

General Policy

EPA GUIDED BY INITIATIVE, CONCERN IN DECISION TO DO IMPACT STATEMENTS

The Environmental Protection Agency decided on its own initiative to begin preparing environmental impact statements on its regulatory activities, according to Sheldon Meyers, director of EPA's Office of Federal Activities.

Congressional pressure was "a factor" in the decision but "not a predominant factor," Meyers told Environment Reporter April 19.

He said EPA still believed it was not bound by the National Environmental Policy Act to write environmental impact statements on its regulatory activities. However, the need to do more to explain the rationale behind its regulatory activities has concerned EPA for some time, he said.

Meyers made note of an EPA task force report, dated February 1973, which studied the application of NEPA to EPA's regulatory activities. The report said, "Pending final conclusion of all out-standing issues, EPA should implement the spirit of NEPA to the greatest extent possible."

Meyers said that in June 1973 EPA issued a notice of the procedure the agency would follow in preparing and issuing "environmental explanations" of certain of its own proposed standards, regulations, and guidelines.

At that time, EPA said the procedures were responsive to growing public demand that government agencies provide "full and public explanations of their actions." The agency said it would provide explanations of "major" proposals.

Meyers said EPA's recent voluntary decision to do impact statements on its regulatory activities was a further step in meeting the agency's responsibility to the public, providing for greater public involvement, and providing better analysis of EPA's activities.

He said EPA plans to publish a statement of policy in early May and should be ready to issue final procedures in June. Meyers noted that impact statements developed under these procedures would apply only to prospective regulatory activities and would not be retroactive.

EXHIBIT B

EXCERPTS FROM APPLICATION OF THE NATIONAL ENVIRONMENTAL PROTECTION ACT TO EPA'S ENVIRONMENTAL REGULATORY ACTIVITIES, TASK FORCE REPORT, EPA, 1973.

Program Examples

How these trends evidence themselves and how the above listed factors are considered, can be best appreciated by reviewing the substantive aspect of EPA's decision-making process with respect to specific regulatory programs. For purposes of comparison and analysis, programs can be arrayed along a spectrum, established in terms of statutory criteria, ranging from those based entirely on consideration of technology and cost, through programs requiring an explicit balancing of costs and benefits, to programs in which attainment of a certain ambient condition is the sole statutory target.

New Stationary Source Emission Standards (Air)

A program in which standards are based almost exclusively on technology and cost considerations is establishment of emission standards for new stationary sources. Decision-making here involves two stages, the first of which takes account of ambient air considerations. Under the program, EPA first publishes a list of categories of stationary sources which may contribute significantly to air pollution causing or contributing to endangerment of public health or welfare.

Once the sources categories are listed, EPA must propose and set regulations establishing standards of performance for new sources within each category. A standard of performance is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." In establishing performance standards, analysis focuses almost entirely on the questions of what is the best system of emission reduction, what does it cost, and has it been adequately demonstrated. Alternative emission levels largely reflect the accomplishments of alternative abatement technologies.

In setting new source performance standards, explicit consideration is not given to their predicted impact on ambient air conditions. Indeed, the major premise underlying the program is that standards should be uniform across the Nation, so that polluting industries will be denied any inducement

to locate in clean air regions, where emission standards might otherwise be less strict. 2/ However, in limited cases, control of one pollutant may cause a problem with another air pollutant. When this occurs, the benefits of the control of one pollutant will be weighed against the problems caused with the other pollutant involved.

Similarly, in determining what abatement technology is "best," consideration is given to the pollution effects of such technologies on media other than air. Such consideration, though, generally is limited to reviewing whether such problems are of sufficient magnitude to compromise the air pollution abatement benefits of a technology being considered, as opposed to making a detailed evaluation of what all such non-air pollution problems are. In like fashion, consideration is given to other environmental problems, insofar as they have a reasonably direct relationship on the cost or feasibility of a proposed standard. Thus, in establishing performance standards for fossil-fueled steam generators, much analysis was devoted to the availability of low vs. high sulfur coals, and the consequences of their supply, while less consideration was given to the probable effect on energy supply and the environmental consequences thereof. 3/

2/ Concurrently, however, State implementation plans must provide for location of new stationary sources in a manner that does not cause violation of national primary or secondary ambient air quality standards.

3/ e.g., whether pollution abatement costs would result in increased reliance on nuclear energy.

C. ESTABLISHMENT OF STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES (AIR)

The program involves (1) designation of the source category and (2) setting performance standards. The Clean Air Act requires that the selection of emission standards reflect both adequately demonstrated technology and consideration of cost of control. The source categories considered are those which may contribute significantly to air pollution causing or contributing to endangerment of public health or welfare.

I. Full Compliance

1. Substantive Effects: Full compliance with NEPA will result in better documentation of the secondary impact of the standards and of the criteria for selection of the source categories to be regulated. The alternatives explored, both in regard to standards and technology, would be disclosed to the public. Any adverse effects would also be made public with the rationale for the standard set and the balances of benefit versus adverse effects. Currently the development of new source performance standards takes into account the cost of control and the economic impact of the standard. If compliance with NEPA requires a balancing of cost and environmental effects or benefits, significant changes in the standards might occur so that best control technology might not be prescribed. The performance standards, therefore, may not meet the criteria of the Act.

2. Procedural Effects: It is assumed the draft impact statement will be published simultaneously with the proposed standards (120 days after categories published) and the final statement will be published prior to promulgation of the standards (90 days after standards are proposed).60/ Because standards for several categories are proposed at the same time and the time schedule is severe, a great amount of additional effort will be required. More detailed disclosure of an increased variety of factors will substantially increase the range of public comments. Because performance standards are established for individual source categories, cost/benefit analysis considering the total environment will open many debates on the

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60/ The legal problems with this program are discussed supra p. 36-37.

level of the standards. Therefore, significant delays due to increased litigation may result.

3. Incremental Manpower Requirements: An estimated 19 new source performance standards will be formulated in FY 73 and an estimated 10 will be established in FY 74. At least one and a half additional man-years per standard are estimated to be needed for full compliance with NEPA: 1 man-year to complete additional documentation, cost/benefit analysis and draft impact statements; 1/2 man-year to complete final impact statements and follow through appropriate channels. This represents approximately a 100% increase in technical staff presently responsible for actual preparation of the standards and 50% increase in staff responsibility for briefing materials and standards review. If manpower were not increased, the rate of standards being promulgated would be decreased.

	Actions/Year	Man-Years/Action		Total Man-Years	
		Max.	Min.	Max.	Min.
FY 73	19	2.0	1.5	38	28.5
FY 74	10			20	15

4. Benefit: Full compliance with NEPA would result in providing more information to the public, industry, and other government agencies in regard to the source categories selected, standards proposed, and consequences and benefits of these actions. Full compliance might necessitate a balancing of costs and benefits of the standards being considered; the benefits to the public health and welfare would be stressed. The basis and rationale for setting standards would be documented for internal and public use.

II. Intermediate Compliance

1. Description and Benefit: The option for intermediate compliance selected for new source performance standards is to comply with NEPA analysis requirements without filing an environmental impact statement. In this way, EPA would more thoroughly analyze the consequences of its standards and control technology

and the rationale for setting the standards at certain levels and examine in detail the alternatives and secondary impacts. If there are portions of NEPA which conflict with legislative mandates of this program, these need not be addressed under this option. Following this option would provide a more accurate estimate of the manpower required to complete the additional analysis required and an indication of whether statutory time constraints would have to be changed were NEPA to be legally applied.

2. Incremental Manpower Requirements: The additional manpower required under this option would be approximately one man-year per standard to complete development of the required additional data and information. This estimate may need to be greater due to the setting of standards for various categories simultaneously.

Actions/Year	Man-Years/Action		Total Man-Years	
	Max.	Min.	Max.	Min.
19	1.5	1.0	28.5	19

EXHIBIT C

EXCERPTS FROM RESPONDENT'S REPLY BRIEF

The standards should not be set aside without the petitioner or intervenors' overcoming the presumption that the standards are proper and in accordance with the law. See Delaware Citizens for Clean Air v. Ruckelshaus, _____ F.2d _____ (C.A. 3, No. 72-1548, June 21, 1973) slip opinion, pp. 9 and 11. In view of the foregoing and taking into account that the Administrator is currently preparing to publish information in compliance with this Court's remand directives, 3/ the standards should remain in effect.

II

THE ADMINISTRATOR IS NOT REQUIRED TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT, PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT, IN ORDER TO PROMULGATE NEW SOURCE STANDARDS

This Court thoroughly discussed, in its opinion, the issue of whether or not the Administrator must prepare an environmental impact statement in order to promulgate new source standards pursuant to Section 111 of the Clean Air Act, 42 U.S.C. sec. 1857c-6. The Court reached the conclusion that since EPA's proposed standards are "inevitably an alert to environmental issues" and an alert "to the public and the Congress

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3/ The Administrator intends to publish this material within the next two to four weeks.

who will have an opportunity to comment as to possible adverse environmental effects," a NEPA impact statement was not necessary for the promulgation of Section 111 new source standards.

Petitioner, however, continues to take the position that an impact statement is required. In addition to arguments previously made to the Court, Portland points out that Congress is considering an appropriation bill for $5,000,000 for EPA to prepare impact statements. Portland apparently fails to realize that EPA does in fact prepare impact statements with regard to functions directed by statutes other than Section 111. See 33 U.S.C. sec. 1371. The fact that EPA receives appropriations for the preparation of impact statements does not indicate any Congressional intent whatsoever that Section 111 requires the preparation of such statements. The appropriations bill has no relevance to whether or not Section 111 of the Clean Air Act requires the preparation of impact statements.

Portland also asserts, incorrectly, that EPA now takes the position that it should prepare NEPA statements before setting its standards. This is based on the Administrator's announcement on June 14, 1973, of the policy that EPA will make available to interested persons a statement of the basis and

purpose of any proposed action, and an explanation of its environmental effects. Petitioner quotes the information which the Administrator will provide to interested persons and states, "This information constitutes an environmental impact statement as required by NEPA." Portland petition, p. 6. Suffice it to say that the information to be distributed by the Administrator to interested persons is most certainly not "an environmental impact statement as required by NEPA." Nor is it intended to be. 4/ The Administrator, as evidenced by his position in this case, is in total agreement with the determination set forth in the Court's opinion 5/ that a NEPA impact statement is not required in promulgating new source standards under Section 111.

4/ The contents of a NEPA impact statement are specifically described in the CEQ guidelines for the preparation of environmental impact statements, 38 Fed. Reg. 20550-20562, August 1, 1973.

5/ Cf. Duquesne Light and Power Company v. Ruckelshaus, _____ F.2d _____ (C.A. 3, 1973), No. 72-1542, decided June 5, 1973, and Appalachian Power Company v. Ruckelshaus, _____ F.2d _____ (C.A. 4, 1973), No. 72-1517, decided April 11, 1973.